



Doc Code: AP.PRE.REQ

PTO/SB/33 (07-05)

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PRE-APPEAL BRIEF REQUEST FOR REVIEW		Docket Number (Optional) 4845-0101PUS1	
		Application Number 10/530,290-Conf. #3643	Filed June 14, 2005
		First Named Inventor Thomas L. HASCHEN et al.	
		Art Unit 1761	Examiner K. J. Mahafkey

Applicant requests review of the final rejection in the above-identified application. No amendments are being filed with this request.

This request is being filed with a notice of appeal.

The review is requested for the reason(s) stated on the attached sheets.

Note: No more than five (5) pages may be provided.

I am the

- applicant /inventor.
 assignee of record of the entire interest.
See 37 CFR 3.71. Statement under 37 CFR 3.73(b)
is enclosed. (Form PTO/SB/96)
 attorney or agent of record.

Registration number 46,472

Signature

Robert J. Webster
Typed or printed name

- attorney or agent acting under 37 CFR 1.34.
Registration number if acting under 37 CFR 1.34. _____

(703) 205-8000

Telephone number

August 6, 2007

Date

NOTE: Signatures of all the inventors or assignees of record of the entire interest or their representative(s) are required.
Submit multiple forms if more than one signature is required, see below*.

*Total of 1 forms are submitted.



Docket No.: 4845-0101PUS1
(PATENT)

IN THE UNITED STATES PATENT AND TRADEMARK OFFICE

In re Patent Application of:
Thomas L. HASCHEN et al.

Application No.: 10/530,290

Confirmation No.: 3643

Filed: June 14, 2005

Art Unit: 1761

For: FERMENTATION BYPRODUCT FEED
FORMULATION AND PROCESSING

Examiner: K. J. Mahafkey

REQUEST FOR A PRE-APPEAL BRIEF CONFERENCE

Commissioner for Patents
P.O. Box 1450
Alexandria, VA 22313-1450

Sir:

Appellants hereby request a pre-appeal conference with respect to the final Office Action dated April 5, 2007, in which pending claims 84-122 continue to be rejected. A Notice of Appeal is being filed on even date herewith.

A Corrected Substitute Amendment filed on August 3, 2007 has been filed to address the Advisory Action dated July 12, 2007 and, hopefully, will be entered for purposes of Appeal. In that Corrected Substitute Amendment, claims 1-97 and 99-122 are pending, and are under final rejection

GROUNDS OF OBJECTION AND REJECTION TO BE REVIEWED IN THE PRE-APPEAL BRIEF CONFERENCE

A. Claims 96, 106, 110, 116 and 122 stand rejected under 35 U.S.C. §112, First Paragraph, for failing to comply with the written description requirement.

B. Claims 84-122 stand rejected under 35 U.S.C. §112, Second Paragraph, for being indefinite.

C. Claims 84-122 stand rejected under 35 USC §103(a) as being unpatentable over U.S. patent 5,824,355 to Heitritter in view of Schingoethe (Feed Wet Distillers Grains to Dairy Cattle, May 2001).

I. ARGUMENT

A. Claims 96, 106, 110, 116 and 122 stand rejected under 35 U.S.C. § 112, 1st Paragraph for failing to comply with the written description requirement. Appellants respectfully submit that this rejection is improper and should be reversed. Appellants aforementioned Corrected Substitute Amendment, amends claims 96, 106, 110, 116 and 122 to obviate this rejection and, based on entry of those claim amendments, respectfully submits that this rejection is moot.

B. Claims 84-122 stand rejected under 35 U.S.C. §112, Second Paragraph, for being indefinite. Appellants respectfully submit that this rejection is improper and should be reversed. The Office Action indicates that the term “an empirical relationship” in claims 84, 86, 103, 105, 109, 112, 114, 115 and 119-121 is a relative term that renders the claims indefinite. The Office Action further asserts that (1) this terminology is not defined by the claim; (2) the specification

does not provide a standard for ascertaining the requisite degree; and (3) one of ordinary skill in the art would not be reasonably apprised of the scope of the invention.

This rejection is because an empirically derived relationship is conventionally defined as a relationship that is derived from, and is based upon, controlled experiments. A careful reading of Appellants' disclosure reveals that they disclose a number of controlled experiments which support an empirically derived formula recited in the claims. One of ordinary skill in the art only has to follow Appellants' detailed disclosure, which includes numerous examples, to empirically derive a relationship that relates the UIP as a percent of the crude protein (CP) to an end product temperature in a predictable and repeatable manner to produce end products for other starting materials than those explicitly disclosed. Accordingly, Appellants respectfully submit that the terminology "an empirical relationship" has a well-known meaning and that its metes and bounds are readily able to be determined by one of ordinary skill in the art.

C. Claims 84-122 stand rejected under 35 USC §103(a) as being unpatentable over U.S. patent 5,824,355 to Heitritter in view of Schingoethe (Feed Wet Distillers Grains to Dairy Cattle, May 2001). Appellants respectfully submit that this rejection is improper and should be reversed. Hietritter does not disclose or suggest a method for predictably enhancing the nutrient value of distillers, brewers or fermenting grain products, as recited in all pending claims, let alone based on an empirical formula, as claimed. All that Hietritter does is to merely mix various ingredients, adds water, cooks them, comes up with end products, and measures certain nutrient values. That's it. There is no predictability of nutrient values based on an empirical formula because Heitritter was unaware of the existence of an empirical formula, or of using the claimed empirical formula to improve the nutrient value of grain by-products.

Combining the teachings of Heitritter and Schingoethe leaves us with a total mixed ration for lactating dairy cows. Appellants respectfully submit that looking at the 40 to 50 ingredients going into Heitritter's ration will only properly motivate one of ordinary skill in the art to start mixing wet materials with dry ones and then heat treating until they are dry, and nothing more. Neither Heiritter nor Schingoethe has any disclosure of Appellant's claimed predictability based on an empirical formula. With respect to Heitritter, Heitritter gives data in only one of his examples, i.e., Table II, concerning temperature and RUP. In the explanation of the table he states that the cooked material had a temperature of 200°F and the table shows that this material reached a RUP of 69.6% of the crude protein as compared to only 25.6% RUP in the uncooked product. In order to draw a line between these two points so as to calculate the slope of the line we need to know the temperature of the uncooked product. Perhaps it was "ambient temperature," but Heitritter does not explicitly state what it is. Further, in this regard, if the production was done in a heated building this temperature might be about 70 degrees F., and if the production was done in an unheated building (as is the norm in production) the temperature may be close to freezing as in the winter or above 85 degrees F., as in the Summer.

Additionally, for statistical analysis of the data set one needs paired values, that is, a series of RUP values for given cooked temperatures. As indicated above, the paired value for the first RUP reported by Heitritter is not disclosed, and thus no statistical analysis of Heitritter's data is possible. Heitritter does not teach of the points of RUP/UIP levels and temperatures, and there is no way that such relationships can be extrapolated from Heitritter's disclosed data because Heitritter discloses only one value for his cooking temperature. Furthermore, Heitritter does not predetermine the levels of crude protein and amino acids or the UIP/RUP that the end

Request for a Pre-Appeal Brief Conference

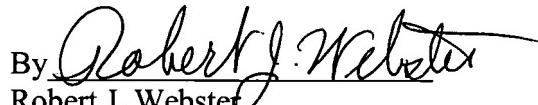
product will contain. He makes the product and then analyses to see what levels were achieved. For example, Heitritter's process is not varied to achieve a variety of possible outcomes.

Additionally, the two references applied in this rejection teach away from being combined, as suggested. Heitritter's invention uses oil seed meals mixed with hulls (example soybean meal and soybean hulls) and Heitritter's patent calls for the use of oil seed meals. Oil seeds are plants that are grown specifically for their high oil content. However, corn has about 3.5% oil in the grain and corn oil is extracted only after the oil has been concentrated in some of the byproducts formed during the refining of corn starch. In Appellants opinion, corn is grown for its starch content and not its oil and is not considered an oil seed by one of ordinary skill in the art to which this invention pertains. Adding soybean hulls based on Schingoethe's generic historical disclosure would not enhance the nutrient source and, in fact, would reduce the nutrient levels because the hulls are very much inferior in nutrient levels compared to soybean meal. Therefore, one of ordinary skill in the art would not be prompted to modify Heitritter in view of Schingoethe, as suggested.

Accordingly, this rejection is improper and should be reversed.

Dated: August 6, 2007

Respectfully submitted,

By 
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